IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR PETITIONER.

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Opinions Below.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372, and is printed in Appendix A to the Petition for Certiorari. The memorandum opinion and judgment of the said Appellate Department, rendered prior to rehearing and subsequently replaced by the aforesaid opinion and judgment appearing in Appendix A to the Petition for Certiorari, was rendered on October 27, 1971. The said opinion is not reported and appears in Appendix B to the Petition for Writ of Certiorari.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California for the

County of Los Angeles (App. Pet. A)* was entered on February 7, 1972.

The initial judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (App. Pet. B) was entered on October 27, 1971, and the order correcting the said judgment (App. Pet. C) was entered on November 3, 1971. Upon the filing of a due and timely petition for rehearing, an order was made by the said Appellate Department granting the petition for rehearing. The said order was entered on November 10, 1971, and appears as Appendix D to the Petition for Certiorari.

Upon rehearing, the Appellate Department rendered its aforesaid judgment, entered on February 7, 1972 (App. Pet. A). On the same date the Appellate Department entered its order certifying the cause to the Court of Appeal pursuant to Rule 63(a) and (3), California Rules of Court. A copy of the said order certifying the cause to the Court of Appeal appears as Appendix E to the Petition for Certiorari. On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause. A copy of the said order appears as Appendix F to the Petition for Certiorari.

By the aforesaid denial of transfer by the Court of Appeal the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had.[1] See, California Penal Code

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*The reference "App. Pet." refers to the Appendices to the Petition for a Writ of Certiorari herein and are not reprinted here.

[1]A petition for a writ of habeas corpus was subsequently filed in the Supreme Court of the State of California and denied by

§1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California*, 361 U.S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the sole evidence upon which his conviction rests establishes that petitioner sold a book to an adult who requested it and where the prosecution stipulated that petitioner neither sold material dealing with sex to minors nor thrust such material upon an unwilling public.

2. Whether a sexually explicit book, when sold to a consenting adult, surrounded by notice to the public of its nature and with reasonable protection from exposure to juveniles, is patently offensive, appeals to prurient interest, and is utterly without redeeming social value.

3. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge the exercise by petitioner of freedoms of

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that Court without opinion on April 12, 1972, Judge Mosk being of the opinion that the Respondent should be ordered to show cause why the relief prayed for in the petition should not be granted. A copy of the order denying the petition for writ of habeas corpus appears as Appendix G to the Petition for Certiorari.

speech and press, contrary to the provisions of the First and Fourteenth Amendments, because petitioner was convicted of selling a book to a consenting adult, which book is legally indistinguishable from books found to be not obscene by this Court.

4. Whether California Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because petitioner was convicted without any evidence in the record that the charged book was utterly without redeeming social importance and where the only uncontroverted evidence established that the book had social value.

5. Whether Penal Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and the equal protection of the laws and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments:

(a) because he was convicted under a "pandering" theory although neither the statute nor the accusatory pleading fairly informed him that he was charged with pandering in connection with his sale of the book and where there was no evidence of pandering and the jury was never instructed upon that issue; and

(b) where the state pandering statute which became effective long after petitioner sold the book was retroactively applied to punish petitioner's alleged conduct of "pandering" when such conduct was not punishable under the laws of the State at the time of the sale of the book and the highest court of the State had ruled

that evidence of such conduct could not be used to support a conviction under California's general obscenity statute.

6. Whether California Penal Code Code §§311 and 311.2, as construed and applied, deprive petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the standard for judging the alleged obscenity of the book petitioner sold was based upon the community standards of the State of California and not the standards of the Nation as a whole.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments and Article I, §10, of the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 at the time of the commission of the alleged offense, and the provisions of California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, appear in Appendix A hereto.

Statement.

On June 3, 1969, a three-count Complaint was filed against Petitioner in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, charging violations of California Penal Code §311.2, the state obscenity statute [A. 7-8]. The trial under the said Complaint commenced on January 12, 1971, in the said Municipal Court before the Honorable David J. Aisenson, a Judge of the said Court, and a jury. On February 4, 1971, the jury returned verdicts of acquittal as to two of the counts

and returned a verdict of guilty solely with respect to the sale by petitioner of a paperback book entitled "Suite 69" to a police officer who had requested it [A. 54-56].

Prior to trial, petitioner moved to dismiss the Complaint on the basis that sale of sexually oriented material to consenting adults only is constitutionally permissible [A. 10]. In connection with the motion, the prosecution stipulated that [it did not claim that] petitioner neither disseminated any material to minors nor thrust it upon the general public [A. 14]. The Court denied the motion [A. 14-15]. Petitioner also moved the Court prior to trial to dismiss Count 3 of the Complaint on the basis that the book there charged, "Suite 69," is constitutionally protected as a matter of law [A. 15-17]. This motion also was denied [A. 32].

At the trial it was established that petitioner is the owner of a bookstore located in the City of Los Angeles, County of Los Angeles, State of California. A police officer testified that he purchased the book from petitioner who was then working as a clerk in his bookstore [A. 37-58]. The officer stated that he had asked petitioner whether he had any good sexy books, and that petitioner had replied that all his books were sexy [A. 54]. The police officer subsequently asked if petitioner had any real good paperback books, and petitioner replied that he was "reading one right now, and it's called 'Suite 69'" [A. 54-55]. Petitioner then read a portion of the book to the officer [A. 55]. On cross-examination, the police officer stated that there are about 250 "adult bookstores" in the City of Los Angeles [A. 59].

Aside from the testimony of the aforesaid police officer, the only other testimony offered by the prosecution was by another vice officer who testified over objection [A. 114-115, 115-116, 121], that the material in question appealed to a prurient interest in sex and exceeded customary limits of candor, based upon the contemporary community standards of the State of California [A. 128]. The officer's testimony was based upon a public opinion survey taken by the officer in which he identified himself as a police officer to the persons questioned [A. 93-94]. The vice officer also stated that he had personally made about 300 arrests for alleged violations of the state obscenity laws [A. 180-181]. The prosecution offered no testimony that the book was utterly without redeeming social importance. A motion for judgment of acquittal at the end of the prosecution's case was denied as was a motion to strike the opinion testimony of the vice officer [A. 219-226].

On behalf of petitioner, Franklin Laven, an attorney [A. 257], testified that the book "Suite 69" does not exceed customary limits of candor, does not appeal to a prurient interest in sex, and has social importance [A. 292, 302-304]. The witness Laven had been retained by the Commission on Obscenity and Pornography to make a survey concerning the distribution of sexually oriented material throughout the United States [A. 258-259], and the witness was familiar with other research conducted by the Commission [A. 283-286]. The Report of the Commission (Govt. Printing Office, September, 1970) was offered by petitioner [A. 174], but was not admitted into evidence [A. 177]. The Court did receive in evidence by way of judicial notice a book entitled "Adam and Eve," found to be

constitutionally protected by the Court in *Hoyt v. Minnesota*, 399 U.S. 524 [A. 173-174, 338-339].

At the close of all the evidence, petitioner again moved for judgment of acquittal, which again was denied [A. 429-433]. Following the return of the verdicts [A. 479-480] and the denial of petitioner's motion for a new trial, [A. 6] Petitioner was granted probation for a period of three years, on condition that he spend 30 days in the county jail and pay a fine of $1,000.00.

A due and timely appeal was prosecuted by petitioner to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The questions presented on appeal included the following: (1) That the book "Suite 69" is not obscene and that the state obscenity statute, as construed and applied, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court and the rulings of other federal and state courts holding comparable books to be entitled to constitutional protection; (2) That the prosecution had failed to present any evidence in support of an essential element of the offense, to wit, that the book was utterly without redeeming social importance, and that the statute, as construed and applied to authorize the judgment of conviction upon an uncontroverted record showing that the book was not utterly without redeeming social importance, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; (3) That the statute, as construed and applied to authorize the judgment of conviction based upon a state community standard, and not upon a national

standard, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments; and, (4) That the statute, as construed and applied to authorize the judgment of conviction without any evidence to establish that the book appealed to the prurient interest of the actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the Nation as a whole, violated the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment, affirming the conviction (App. Pet. B). With respect to the issue as to the appropriate community standard, the Court declined to follow the ruling of the Court in *Jacobellis v. Ohio,* 378 U.S. 184. The Court held that "the arguments against a nation-wide standard outweigh those in favor" and that "the state-wide standard applied to all forms of alleged obscenity" (App. Pet. B, p. 11).

With respect to the issue of the failure of the prosecution to adduce any evidence that the book was utterly without social importance, and the fact that petitioner had presented uncontroverted expert evidence that the book had social importance, the Appellate Department asserted that the failure of proof was not fatal. The reasoning of the Court was that California had enacted new legislation, California Penal Code §311(a)(2), effective November 10, 1969, some six months after the commission of the alleged offense herein, which provided that in obscenity prosecutions, where the circumstances of production, purchase, sale,

dissemination, distribution or publicity indicated that matter was "being commercially exploited by the defendant for the sake of its prurient appeal," such evidence was probative with respect to the nature of the matter and could "justify the conclusion that the matter is utterly without redeeming social importance." Based upon such statute and upon another recent statute, California Penal Code §312.1, which abolished the requirement of expert testimony, the Appellate Department concluded that the conversation between the police officer and petitioner, and the advertisements in the back of the book, amounted to "pandering," and since the jury had the right to disregard expert opinion, the jury was justified in finding that the prosecution had sustained its burden of proving that the material was utterly lacking in social importance (App. Pet. B, pp. 12-14). It should be noted at this point that the Complaint against petitioner never made any charge of "pandering"; the case was never tried on a theory of "pandering"; the jury was never instructed that it could consider evidence of "pandering" in reaching a verdict; and, indeed, the prosecution in its brief on rehearing conceded that the concept of pandering could not be constitutionally applied to petitioner. The Court also rejected the contention that the book "Suite 69" is not obscene. Without indicating the distinction between the book herein and comparable books found to be constitutionally protected by this Court, the Appellate Department held that "Suite 69" was obscene and not entitled to constitutional protection.

Following the rendition of the aforesaid judgment of October 27, 1971, petitioner filed a due and timely petition for rehearing or, in the alternative, for certification of transfer to the Court of Appeal, pursuant to

Rule 63 of the California Rules of Court. It was argued in the first place that the Appellate Department had mistakenly relied upon statutes passed after the commission of the alleged offense in order to justify the affirmance of the conviction upon the doctrine of "pandering" as a substitute for evidence in the record that the book was utterly without redeeming social importance. The petitioner pointed out that California Penal Code §§311(a)(2) and 312.1 did not become effective until November 10, 1969, and that the commission of the offense as charged in the Complaint of June 3, 1969, allegedly occurred on May 14, 1969, some six months before the passage of the said statutes. Moreover, the Supreme Court of California had held some two years before that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal. 2d 791, 433 P. 2d 469, 63 Cal. Rptr. 575 (1967).

The attention of the Court was called to the fact that the charge of pandering had never appeared in the accusation in the case herein; that the case was never tried on a theory of "pandering"; that the proof did not establish such "pandering"; and that the jury had never been instructed upon any such theory. It was urged that the Court had failed to recognize that there was a complete absence of proof in the record of an essential element of the offense, to wit, that the book was utterly without redeeming social importance. Petitioner urged upon the Court that its judgment deprived petitioner of his liberty without due process of law and unconstitutionally subjected him to an *ex post facto* application of the laws.

Petitioner also urged upon the Court that the book herein involved was not different in the constitutional sense from the books held to be constitutionally protected by this Court.

The aforesaid petition for rehearing was granted by the Appellate Department on November 10, 1971 (App. Pet. D). In Respondent's brief on rehearing, it was conceded that petitioner had not been prosecuted under any theory of pandering; that instructions had not been given to the jury on such issue; and that the prosecution "did not argue this concept at trial and/or on appeal" [A. 481]. The prosecution admitted that "the case herein will have to be decided on the book *per se*, plus the evidence pertaining to scienter" [A. 482]. In short, the prosecution agreed that the Court had misapplied the California statutes enacted after the commission of the alleged offense, but argued that the judgment should be affirmed in any event.

On February 7, 1972, the Appellate Department, following rehearing, filed its second opinion and judgment and again affirmed petitioner's conviction [App. Pet. A]. In most respects the Court merely reiterated its prior opinion. The Appellate Department held that the book "Suite 69" is obscene and not entitled to constitutional protection; that the appropriate community standard is that of the State rather than the Nation as a whole, even in a case involving a book intended for nation-wide dissemination; that the question of prurient appeal need not be measured by the book's impact upon its actual and intended audience, even though the prosecution had stipulated that the petitioner neither disseminated the book to minors nor thrust it upon the general public; that the burden of persuasion rested initially with an accused in an obscenity prosecution

on the issue of redeeming social value; that although the only evidence in the record on the issue of social value had been produced by petitioner, nevertheless the jury was entitled to disregard such testimony; and that the prosecution had sufficiently met its burden on the element of social value when evidence of "pandering" appeared in the record. The Court held that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413, must always have been deemed to be the law in California; that the statutes enacted after the commission of the alleged offense herein merely codified such pre-existing law; and that therefore the retroactive application of the statutes did not deprive Petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to deprivation of his liberty on a charge never made and a theory never tried.

On the same date as the rendition of the aforesaid judgment, the Appellate Department filed an order certifying the cause to the Court of Appeal, pursuant to Rule 63(a) and (3), California Rules of Court (App. Pet. E). The Appellate Department stated in its certification that the transfer "appears necessary to settle important questions of law." The questions so presented were: (1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?; (2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?; (3) If the answer to the previous question is in the

affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?; (4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicity constitute sufficient evidence of lack of redeeming social value either under the case of *A Book v. Attorney General* (*Memoirs*) [1966] 383 U.S. 413, 420 [16 L. Ed. 2d 1, 6, 86 S. Ct. 975] or under Penal Code Sec. 311(a)(2)?; and, (5) May Penal Code Sec. 311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale of distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause (App. Pet. F).

Summary of Argument.

1. Petitioner was convicted for selling a book to an adult, a policeman, who stated that he wanted it for his personal use. The prosecution stipulated that petitioner did not intrude upon the privacy of the general public by thrusting his books upon an unwilling public and did not sell his books to minors. On this record, there is no more danger of dissemination of sexually explicit material to minors nor of an assault by such material on the general public than was presented in *Stanley v. Georgia*, 394 U.S. 557. The sale of a "sexy" book to a consenting adult, in an appropriately controlled bookstore, is protected by the free speech and press provisions of the First and Fourteenth Amendments because an adult person has a right to a private sphere of beliefs, thoughts and emotions. The

constitutional zone of privacy recognized in *Stanley* remains with the consenting adult when he enters a bookstore. Whether this constitutional right is viewed as a First Amendment right, a privacy right, or as an interrelationship of both, it is clear that petitioner's conviction cannot stand consistent with the constitutional principles enunciated in *Stanley v. Georgia.*

2. The sale of a sexually explicit book to a consenting adult when surrounded by notice to the public of its nature and by reasonable protection against exposure to juveniles, is not obscene because the American public does not find such a sale "patently offensive." Moreover, a sale of such a book to a consenting adult has social value and does not appeal to prurient interest. Since 1957, this Court has struggled to find an accommodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity. In doing so, members of the Court have repeatedly recognized that whether a publication is obscene or unconditionally protected speech depends largely upon the effect that the publication may have upon those who receive it. It has been recognized that the same publication may have a different impact "varying according to the part of the community it reached." When *Roth* was decided, the Court was aware of the fact that "obscenity" was not a precise concept and that its scope could not remain static. Accordingly, the Court fashioned a rule designed for changing times. In the 15 years that have elapsed since *Roth* was decided, American society has undergone great changes in its attitudes towards sex and in its attitudes towards the open, frank depiction of sexual matters, par-

ticularly to consenting adults. The Commission on Obscenity and Pornography, created by Congress in 1967, engaged in a thorough study of sexual materials to determine the effect of exposure to such material and the American public's attitude toward the circulation of such material. The Commission engaged in a great deal of independent research and conducted a national survey. The results of the Commission's scientific investigation reveal that a majority of the American people believe it appropriate to sell or exhibit sexually explicit material to consenting adults. The studies also reveal that such material has substantial value to a significant number of Americans and that such material appeals to the normal curiosity of the average person rather than to his "prurient interest." Recent cases also recognize that such material has social value and, when distributed to consenting adults does not appeal to prurient interest and is not patently offensive. The statute herein cannot be applied constitutionally to the sale herein. The statute can be constitutionally applied only if the State alleges, in its accusatory pleading, and proves, that the sale of a challenged book patently offends contemporary standards and appeals to prurient interest and is utterly without redeeming social value because the sale was not surrounded by a notice to the public of the challenged book's nature and by reasonable protection against exposure to juveniles.

3. The book "Suite 69" is not obscene when measured by similar books afforded constitutional protection by this Court. The book consists of words only—it is pure speech. It contains no pictures, it was not pandered, it was not sold to a minor and it was not thrust upon the general public. *Redrup v. New York*, 386 U.S. 767, and its progeny protect the book.

4. The jury, by its verdict, found that the book "Suite 69" was utterly without redeeming social value. This judgment was reached by the jury notwithstanding the fact that the State produced no evidence to this effect and petitioner produced expert testimony that the book did have social value. The said conviction denied petitioner due process of law. Moreover, the State denied petitioner due process of law by construing its obscenity statute as shifting the burden of producing evidence on the element of social value to the defendant once the prosecution produces evidence that the material appeals to prurient interest and exceeds customary limits of candor. Such a construction is unreasonable and unconstitutionally undermines the presumption of innocence which accompanies the accused and which extends to every element of the charged offense.

5. Petitioner was convicted upon the theory that proof of "pandering" may serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance. This reliance on the "pandering" doctrine was made although no charge of pandering was made in the accusatory pleading and no proof of pandering was adduced at trial. Petitioner's conviction was affirmed in reliance on "pandering" even though the jury was never instructed on that issue and the prosecution itself conceded that pandering could not be invoked to confirm the conviction because the state "pandering" statute became effective long after petitioner sold the book in question. In short, petitioner was convicted of pandering although he was not informed, by statute, charge or jury instruction, that pandering was involved in his case. Such a conviction plainly violates due process of law and renders

the statute unconstitutional as applied. *Rabe v. Washington*, 405 U.S. 13.

6. The trial court erroneously instructed the jury to judge the book on the basis of state standards, rather than national standards. The First Amendment, of course, is national in scope and no book should be condemned and placed outside the protection of the First Amendment unless it offends national standards. A national Constitution permits nothing less.

I.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein, Where the Sole Evidence in the Record Establishes That Petitioner, a Retail Bookseller, Sold the Book to an Adult Who Requested the Book and Purchased It, Ostensibly for His Personal Use, and Where the Prosecution Stipulated That Petitioner Neither Sold the Material in His Bookstore to Minors nor Thrust It Upon the General Public, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

In *Roth v. United States*, 354 U.S. 476, the Court held that obscenity, like libel and "fighting words," was not within the area of constitutionally protected speech, and thus could be regulated by the states without regard to whether the utterance was shown to create a clear and present danger of antisocial conduct or shown to probably induce its recipients to such conduct. At the same time, the Court stated that "sex and obscenity are not synonymous" and that sex "is

one of the vital problems of human interest and public concern" (354 U.S. at 487). Although obscenity, properly defined, was held to be non-speech because "utterly without redeeming social importance" (354 U.S. at 484), the Court emphasized that it was vital that the standards for judging alleged obscenity "safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (354 U.S. at 488). Thus, the Court in *Roth* recognized that "obscenity" is not a talismanic label sufficient to insulate from constitutional scrutiny all state action directed against it.

The Court's decisions following *Roth* have consistently measured state attempts to suppress obscenity against constitutional guarantees. Thus, in *Smith v. California,* 361 U.S. 147, the Court stated: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." (361 U.S. at 155). In *Marcus v. Search Warrants of Property,* 367 U.S. 717, the Court held that every obscenity proceeding implicates First Amendment questions. In that case, the state statutory search and seizure procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled." (367 U.S. at 731). In *Quantity of Copies of Books v. Kansas,* 378 U.S. 205, the Court emphasized that a state was not free to adopt whatever procedures it pleased for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. No verbal formula capable of repressing expression—be it obscenity, libel, or fighting words—is immune from this Court's concern for the protection of constitutional

rights. Compare, *Beauharnais v. Illinois*, 343 U.S. 250, with *New York Times Co. v. Sullivan*, 376 U.S. 254; and *Chaplinsky v. New Hampshire*, 315 U.S. 568, with *Gooding v. Wilson*, 405 U.S. 518.

In such cases as *Smith*, *Marcus*, and *Quantity of Copies of Books*, the Court has weighed the States' interest in suppressing obscenity against the individual and social interest in the free flow of ideas. Similarly, in *Stanley v. Georgia*, 394 U.S. 557, the Court held that no state interest in regulating obscenity justified a criminal prosecution for private possession of obscenity. The Court balanced the various asserted state interests in prohibiting private possession of obscenity against the individual's "right to receive information and ideas, regardless of their social worth" (394 U.S. at 564), and the individual's "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." (394 U.S. at 564). Protection of the individual's right to receive information and ideas, regardless of their social worth, required a sphere of privacy from governmental intrusions into citizens' " 'beliefs, their thoughts, their emotions and their sensations.' " (394 U.S. at 564). The necessary relationship between First Amendment freedoms and the right of privacy was recognized in *Stanley* by the citation of *NAACP v. Alabama*, 357 U.S. 449, 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association"). The right of privacy protected in *Stanley* was not simply the privacy of the home, as protected by the Fourth Amendment, but the privacy of the mind and heart—the

privacy of an individual's beliefs, thoughts, emotions and sensations.

In *Stanley*, 394 U.S. 557, the initial argument made by the State was that under *Roth* obscenity is simply not constitutionally protected, and therefore the State was free to deal with obscenity in any manner. To this argument, the Court made the following reply: "Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. *But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth nor any other decision of this Court reaches that far.*" (394 U.S. at 563) (Emphasis added).

The Court secondly rejected Georgia's argument that obscenity is no essential part of any exposition of ideas. "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." 394 U.S. at 566.

The State argued in *Stanley* that it had an interest in protecting the individual's mind from the effects of obscenity. The argument, in essence, amounted to an assertion by the State of the right to control the moral content of a person's thoughts. The Court replied that this may be a noble purpose to some, "but it is wholly inconsistent with the philosophy of the First Amendment." As in *Kingsley Int'l Pic. Corp. v. Regents*, 360 U.S. 684, 688-689, obscenity cannot be suppressed on ideological or theological grounds. The

Constitution protects the right to receive information and ideas, "regardless of their social worth." 394 U.S. at 564, 565-566.

The State contended that it had a justifiable interest in preventing exposure to obscene materials which might lead to deviant sexual behavior or crimes of sexual violence. The Court replied that there appeared to be little empirical basis for that assertion.[2] "But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent crime or education and punishment for violations of the law . . .'" 394 U.S. at 566-567.

Finally, the State argued in *Stanley* that prohibition of possession of obscenity was a necessary incident to state statutes proscribing public dissemination of such material. The Court rejected this argument also, stating that "the individual's right to read or observe what he pleases . . . is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 U.S. at 568. The Court concluded, "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. at 568.

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[2]"Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy, or severe emotional disturbances." (*The Report of the Commission on Obscenity and Pornography*, September, 1970, United States Government Printing Office, p. 52).

The Court in *Stanley* identified two legitimate state interests in regulating obscenity: "The danger that obscene material might fall into the hands of children, see Ginsberg v. New York [citation], or that it might intrude upon the sensibilities or privacy of the general public. See, Redrup v. New York, 386 U.S. 767, 769. . . ." 394 U.S. at 567. The Court found that no such dangers were present in the case before it, and therefore the State had no interest sufficient to justify its prosecution.

In *United States v. Reidel,* 402 U.S. 351, the Court upheld the constitutional validity of 18 U.S.C. 1461 as applied to the commercial dissemination of obscenity through the mails to persons "who state that they are adults." 402 U.S. at 352. The Court held that in dismissing the indictment prior to trial, "the District Court gave Stanley too wide a sweep." 402 U.S. at 355. The Court reiterated its adherance to *Roth v. United States,* 354 U.S. 476, and like cases which "have interpreted the First Amendment not to insulate obscenity from statutory regulation." 402 U.S. at 356. The danger that obscene matter might fall into the hands of children or that it might intrude upon the sensibilities or privacy of the general public, dangers which were not present in *Stanley v. Georgia,* 394 U.S. 557, were potentially present in *Reidel* where the case reached the Court prior to trial. Justice Marshall, concurring in *Reidel,* stated that "Any such mail order distribution poses the danger that obscenity will be sent to children, and although [Reidel] indicated his intent to sell only to adults who requested his wares, the sole safeguard designed to prevent the receipt of his merchandise by minors was his requirement that buyers declare their age." 402 U.S. at 361. Justice Marshall stated his belief "that

distributors of purportedly obscene merchandise may be required to take more stringent steps to guard against possible receipt by minors. This case comes to us without the benefit of a full trial, and, on this sparse record, I am not prepared to find that appellee's conduct was not within a constitutionally valid construction of the federal statute." 402 U.S. at 361-362.

The present case does come before the Court after a full trial, and upon a record establishing that petitioner sold the book in question to an adult police officer who requested it, and purchased it, ostensibly for his own personal enjoyment. Concededly, petitioner neither disseminated his wares to minors, nor thrust them upon the general public. The prosecution's case consisted entirely of proving a discreet, consensual adult transaction. On the present record, there is no more danger of dissemination to minors nor assault upon the general public than was presented by the record in *Stanley*. Nor did petitioner pander the book to his willing customer in the sense that "pandering" was identified in *Ginzburg v. United States*, 383 U.S. 463. Under the facts of this case, California's prosecution of petitioner is no more justified than was Georgia's prosecution of Stanley.

The individual's right to a private sphere of beliefs, thoughts, emotions and sensations, the "right to read or observe what he pleases" (*Stanley v. Georgia*, 394 U.S. 557, 558), is not forfeited when a citizen leaves his home. "Solitude or isolation has never been a precondition to the Constitution's protection of other phases of the right of privacy. See, Katz v. United States, 389 U.S. 347 . . .; Griswold v. Connecticut, 381 U.S. 479, . . .; NAACP v. Alabama Ex Rel. Patterson, 357 U.S. 449. . . . The First Amendment pro-

tects others than the 'hermit and the recluse.'" *United States v. Dellapia*, 433 F. 2d 1252, 1258 (2 Cir. 1970). See, *Eisenstadt v. Baird*, 405 U.S. 438. The constitutional zone of privacy recognized in *Stanley* remains with the consenting adult citizen when he enters a bookstore. The citizen's right to satisfy his intellectual and emotional needs by reading whatever he chooses in the privacy of his home, is dependent upon his ability to lawfully obtain that which he chooses to read.

Petitioner therefore asserts the right of his adult customer to obtain the book of his choice to read in the privacy of his home. Petitioner has standing to assert such rights. *Griswold v. Connecticut*, 381 U.S. 479, 481; *Eisenstadt v. Baird*, 405 U.S. 438.

Whether the constitutional right recognized by the Court in *Stanley v. Georgia*, 394 U.S. 557, is viewed as a First Amendment right, a right of privacy, or, as petitioner contends, an interrelationship of both, it is clear that petitioner's conviction cannot stand consistent with established constitutional principles. Since petitioner's conviction for selling a book to a consenting adult does abridge that adult's right to read what he chooses in the privacy of his home, however that fundamental right is characterized, it cannot be abridged "simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." *Griswold v. Connecticut*, 381 U.S. 479, 497 (concurring opinion of Justice Goldberg). State laws regulating the public dissemination of obscene matter may serve legitimate state interests in protecting children and preventing assaults upon the privacy of the general public, but nevertheless a " 'governmental purpose to control or prevent activities con-

stitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307. . . ." *Griswold v. Connecticut*, 381 U.S. 479, 485. The legitimate interests which California's general obscenity statute may serve simply do not extend to the consensual adult transaction for which petitioner was convicted.

II.

The Sale of a Sexually Explicit Book to a Consenting Adult When Surrounded by Notice to the Public of Its Nature and by Reasonable Protection Against Exposure to Juveniles, Does Not Patently Offend Contemporary Standards, Does Not Appeal to Prurient Interest and Has Social Value.

In Point I, petitioner assumed, *arguendo*, that the book in question was obscene, but that the State's power to proscribe obscenity as constitutionally unprotected could not be exercised in the case at bar, where the book was sold to a consenting adult and where it was stipulated that it was not thrust upon the general public. In this Point, petitioner urges that a book, sold to a consenting adult, surrounded by reasonable protection against exposure to juveniles is not obscene because a sale, under such circumstances, does not patently offend contemporary standards, does not appeal to prurient interest and has redeeming social value.

A. Fifteen years ago in *Roth v. United States*, 354 U.S. 476, this Court held that the First Amendment was no bar to the enactment of a narrowly confined obscenity statute. From the beginning, the Court recognized that the exclusion of obscenity from First Amendment protection created serious dangers to constitu-

tional guarantees. Accordingly, the Court stated in *Roth* (354 U.S. 476, 488):

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. . . ."

It is no secret that the passage of years since *Roth* was decided has not produced a coalescence of judicial opinion but instead of a multiplicity of standards. Mr. Justice Harlan, in 1968, noted that in 13 obscenity cases decided by the Court, from 1957 to 1968, there had been 55 separate opinions among the Justices. The situation has not improved in the intervening 5 years. *Stanley v. Georgia*, 394 U.S. 557; *United States v. Reidel*, 402 U.S. 351; *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (Cal. 1970); *Rabe v. Washington*, 405 U.S. 13.

Throughout this period this Court has struggled to find an accommodation between the constitutionally protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity. Recognizing that constitutional doctrine in this area of the law is still in the formative stage (*Jacobellis v. Ohio*, 378 U.S. 184, 200, Warren, C. J. dissenting), this Court has viewed the problem from a variety of angles, seeking to find the best resolution of the opposing forces at play.

In *Butler v. Michigan*, 352 U.S. 380, the Court unanimously found that the standard for judging materials in general circulation could not be the susceptibility of the most vulnerable, or minors. *Roth*, of course, held that material must be measured by its impact on the "average person". Chief Justice Warren however recognized in his concurring opinion in *Roth* that the line dividing the "obscene" from unconditionally protected speech "is not straight and unwaivering". It depends largely, he said, "upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached." 354 U.S. at 495.

Chief Justice Warren developed this thought further in his dissenting opinion in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 446. *Kingsley Books* was an *in rem* proceeding, not a criminal case in which the context of distribution was implicated. Emphasizing again that for him, it is manner of use that should determine obscenity, Chief Justice Warren said:

> "There is totally lacking any standard . . . for judging the book in context. . . . In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed." 354 U.S. at 446.

In *Jacobellis v. Ohio*, 378 U.S. 184, 195, the Court made the following observation:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material,

the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children'. . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."

In *Ginzburg v. United States*, 483 U.S. 463, the Court focused upon the context of distribution, finding the charged material obscene because it was pandered in an offensive manner rather than sold merely to persons who wished to obtain it. In *Ginzburg*, the Government drew a distinction between unsolicited, offensive mailing and mailing to interested persons. 383 U.S. at 472, n.13. At sentencing, the United States Attorney stated that the same book had previously been distributed to physicians without interference, and that if Ginzburg had not engaged in "widespread, indiscriminate distribution", there would have been no case.

In *Mishkin v. New York*, 383 U.S. 502, Mr. Justice Brennan explained that the use of the term "average person" in *Roth* was utilized "to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test . . . that made the impact of the most susceptible person determinative." 383 U.S. at 509. *Roth* was therefore adjusted as follows: "Where the material is designed for and primarily disseminated to a clearly defined . . . group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." 383 U.S. at 508.

In *Redrup v. New York*, 386 U.S. 767, the Court also focused upon context of distribution. In holding various material not obscene, the Court said (386 U.S. at 769):

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S. Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

In *Ginsberg v. New York*, 390 U.S. 629, the Court adjusted the concept of obscenity to the empirical realities of the target audience—minors. The Court held that material which was not obscene when distributed to the general public could be constitutionally condemned as obscene under a statute which prohibited sale to minors. Mr. Justice Brennan quoted with approval what the New York court said in upholding the statute:

> ". . . [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of ob-

scenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." 390 U.S. at 636.

Mr. Justice Stewart, concurring, emphasized that the Constitution guarantees a "society of free choice". He drew a sharp distinction between voluntary and involuntary exposure to sexually explicit material, saying (390 U.S. at 649-650):

"When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordiance prohibiting people from imposing their opinions on others 'by way of sound trucks with load and raucous noises on city streets.' And so it was that my Brothers BLACK—and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.

"I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. . . ."

In *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, the Court sustained special legislation protecting postal patrons from unsolicited mail advertisements which could not be deemed obscene under *Roth*. Again the Court emphasized the difference between voluntary and involuntary exposure to sexually explicit material, saying (397 U.S. at 738):

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. See Public Utilities Comm. of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952). The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain."

In the cases discussed above, the Court was concerned, primarily with the kinds of special situations that would render otherwise protected speech "obscene." *Stanley v. Georgia*, 394 U.S. 557, dealt with the problem of what situations would entitle otherwise "obscene" material to the protection of the First Amendment. After canvassing the area, the Court concluded that the State had two legitimate concerns—distribution to minors and thrusting sexual material

upon an unwilling audience. In striking down Georgia's obscenity statute because it was not related to any legitimate state interest, the Court held that a person had the right, secured by the First Amendment to read or view whatever he pleases, including what is sometimes described as "hard core pornography." See, *Ginzburg v. United States*, 383 U.S. at 499, n. 3.

A number of courts, in analyzing *Stanley*, concluded that *Stanley* in effect overruled *Roth. United States v. Reidel*, U.S.D.C. C.D. Cal. No. 5845-HP, reversed 402 U.S. 351; *United States v. Thirty-Seven (37) Photographs*, U.S.D.C. C.D. Cal. No. 69-2422-F, reversed 402 U.S. 363; *Keralexis v. Byrne*, 306 F. Supp. 1363 (Mass. 1969), vacated and remanded 401 U.S. 216; *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (Ore. 1970), vacated and remanded 403 U.S. 927; *United States v. Orito*, U.S.D.C. E.D. Wis. No. 70-CR-20, *pending on re-argument* No. 70-69; *Stein v. Batchelor*, 300 F. Supp. 602 (Texas 1969), vacated on other grounds *Dyson v. Stein*, 400 U.S. 200.

Other courts, also recognizing that *Stanley* had effectuated a fundamental change in the obscenity laws, concluded that the statute could be saved by construing it narrowly. *United States v. Dellapia*, 433 F. 2d 1252 (2 Cir. 1970); *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970); *United States v. Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970).

In *Dellapia*, the Court felt obliged, under *Stanley*, "to reinterpret the Act in the light of constitutional

doctrine which never illuminated the problems of obscenity legislation with glaring brightness but which now appears to be shifting as well." 433 F. 2d at 1253. Believing that *Stanley* opened a "new chapter" in the obscenity saga, the Court asked:

> "Where does *Stanley* locate the boundary between the government's right to control obscene matter deemed inimical to public order or the public morality and the right of individuals to keep to themselves? Is there a first amendment privilege to exchange and enjoy in private, letters, stories, books, movies—or spoken words—however sordid?" *Id.* at 1255.

An analysis of *Stanley* led the Court to conclude that these questions can only be answered "by a case-by-case accommodation of legitimate, compelling interests," and that Dellapia's conduct was protected by *Stanley* "Since the government has shown no special circumstances that would justify" his prosecution. *Id.* at 1255. In reaching this conclusion, the Court did not question "the doctrine that under Roth obscenity remains unprotected by the first amendment." *Id.* at 1256. In determining whether the obscenity law should be applied to Dellapia's conduct, however, the Court stated that legitimate government interests "include possible harm to Dellapia and his correspondents from their own use of the obscene films; harm that they might do to others as a result of viewing the films; harm that might be done if the films reached other eyes . . . (especially minors'); and any deterioration in public morals that might result if the government is powerless to proscribe such activity as Dellapia's." *Id.* at 1256.

The nub of the Court's holding, in *Dellapia*, is to be found in the following paragraph:

> "Although the words 'public decency' carry with them uncertainty and imprecision, it is difficult to quarrel with the proposition that things public should be decent. We are increasingly aware of polluted air, rivers, and streets, and we resent their assault upon our senses. When there is inflicted upon one a sexually offensive public display, his right to be let alone is impaired. Things unobjectionable in private may be embarrassing and offensive in a crowd, and the general public includes adults as well as children. By our decision we do not sanction 'the public affront.' . . ." *Id.* at 1256-1257.

In *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970), the Court held that the most sexually explicit, the most tasteless material can invoke constitutional protection under certain circumstances. The Court saw *Stanley* as a return to "orthodox First Amendment considerations". In balancing the respective competing interests, the Court found the statute in question, 19 U.S.C. §305, overbroad, as applied to the importation of sexually explicit material by a private person for private use. The Court however did not feel compelled to invalidate the statute. Instead, the Court construed the statute narrowly, to forbid its application to private importation.

In *United States v. Reidel*, 402 U.S. 351, and *United States v. 37 Photographs*, 402 U.S. 363, the Court rejected petitioners' arguments that *Stanley* had in effect struck down virtually all obscenity laws—

federal and state. In those cases, the Court held, as it had in *Roth*, that Government may proscribe obscenity as such.

B. *"Roth's* evident purpose [was] to tighten obscenity standards". *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 487. Indeed, this Court has been called upon repeatedly to keep the door "tightly closed" to prevent intrusion upon constitutionally protected works dealing with sex.[8] In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, the Court explained its special concern in such cases, saying:

> "We must . . . in proper cases review the evidence to make certain that [constitutional] principles

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[8] *Kois v. Wisconsin*, 92 S. Ct. 2245; *Wiener v. California*, 92 S. Ct. 534; *Hartstein v. Missouri*, 92 S. Ct. 531; *Burgin v. South Carolina*, 92 S. Ct. 46; *Bloss v. Michigan*, 402 U.S. 938; *Childs v. Oregon*, 401 U.S. 1006; *California v. Pinkus*, 400 U.S. 922; *Hoyt v. Minnesota*, 399 U.S. 524; *Carlos v. New York*, 396 U.S. 119; *Cain v. Kentucky*, 397 U.S. 319; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 434; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578; *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573; *Chance v. California*, 389 U.S. 89, *Central Magazine Sales, Ltd. v. United States*; 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Connor v. City of Hammond*, 389 U.S. 48; *Schackman v. California*, 388 U.S. 454; *Cobert v. New York*, 388 U.S. 443; *Ratner v. California*, 388 U.S. 442; *Avansino v. New York*, 388 U.S. 446; *Rosenbloom v. Virginia*, 388 U.S. 450; *Sheperd v. New York*, 388 U.S. 444; *Mazes v. Ohio*, 388 U.S. 453; *Friedman v. New York*, 388 U.S. 441; *Keney v. New York*, 388 U.S. 440; *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448; *Quantity of Copies of Books v. Kansas*, 388 U.S. 452; *Books, Inc. v. United States*, 388 U.S. 449; *Aday v. United States*, 388 U.S. 447; *Gent v. Arkansas*, 386 U.S. 767; *Austin v. Kentucky*, 386 U.S. 767; *Redrup v. New York*, 386 U.S. 767; *Memoirs v. Massachusetts*, 383 U.S. 413; *Tralins v. Gerstein*, 378 U.S. 576; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Jacobellis v. Ohio*, 378 U.S. 184; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S. 684; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *One, Inc. v. Olsen*, 355 U.S. 371; *Times Film Corp. v. Chicago*, 365 U.S. 43.

have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'in the line between speech unconditionally guaranteed and speech which may be legitimately regulated.' . . . In cases where that line must be drawn, the rule is that 'we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protected.' "

Two of the cases cited in support of this proposition were obscenity cases where the Court found, as a matter of law, that the charged material was entitled to constitutional protection. *One, Inc. v. Olesen,* 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372 (1958).

When *Roth* was decided in 1957, the Court was aware of the fact that the concept of obscenity was not precise and that its scope could not remain static. Accordingly, the Court fashioned a rule that was designed to adapt to changing times. Challenged material was to be measured by its appeal to prurient interest, applying contemporary community standards. In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, the Court held that material had to be, *inter alia,* patently offensive to contemporary standards. Under the Court's definition of obscenity, that concept "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened. . . ." *Weems v. United States,* 217 U.S. 349, 378. What is obscenity changes "in the light of contemporary human knowledge. . . ." *Robinson v. California,* 370 U.S. 660, 666, as the social sciences provide "an understanding of the motive forces

of human conduct". *Furman v. Georgia*, 405 U.S. 2726. In *Smith v. California*, 361 U.S. 147, Mr. Justice Frankfurter, concurring, emphasized that the determination of obscenity is made on the basis of contemporary community standards, saying (361 U.S. at 165-166):

> ". . . Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution."

Justice Frankfurter then spoke of the light that could and should be shed on contemporary standards by those social scientists "who give their life to such inquiries" (361 U.S. at 166).

In 1967, Congress enacted Public Law 90-100, creating the Commission on Obscenity and Pornography. Its assigned tasks were to make "a thorough study [of obscene materials] which shall include a study of the causal relationship of such materials to antisocial behavior" and "to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography." Public Law 90-100 required the President of the United States to appoint eighteen members to the Commission. These were to include "psychiatrists, sociologists, psychologists, criminologists, jurists, lawyers, and others from organizations and professions who have special and practical

competence or experience with respect to obscenity laws and their application to juveniles." A list of the members of this Commission and their biographic is contained in *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, September 1970, pp. 634-639. The Commissioners included: the Dean of a major law school; a member of the Court of Appeals of New York;[4] the Chief Judge of a state juvenile court; the Attorney General of California; the Director of a major university library; three clergymen; two psychiatrists specializing in children and youth—one associated with the Menninger Foundation, and the other the Chairman of the Department of Psychiatry at a major university; three sociologists—two from universities (one the Chairman of the Department) and one from a major television and radio network; a professor of film art; the President of a major magazine distribution agency; the Executive Vice President of a major paperback book publishing company; the Deputy Attorney of the Motion Picture Association of the United States; a professor of English; and the founder of a national anti-pornography organization. Three of the Commission members had served as leaders of anti-pornography organizations. Two members were women. The Chairman and Vice Chairman were elected by the Commissioners.

The General Counsel of the Commission was Paul Bender, who represented the Government in *Ginzburg v. United States*, 383 U.S. 463.

For the purpose of obtaining information relevant to the Commission's tasks, the Commission organized itself into four "panels", dealing with (1) Traffic in

[4]Who resigned from the Commission to become a United States Ambassador about midway through the life of the Commission.

sexual materials; (2) The effects of sexual materials; (3) Nonregulatory or "positive" approaches such as sex education, media self-regulation and citizen-action groups; and (4) Law and law enforcement. These panels acted under guidelines prescribed by the Commission as a whole to formulate detailed research programs in order to obtain relevant information. The panels reported to the full Commission every several months, and submitted final panel reports and the underlying research studies to the Commission during the spring and summer of 1970. The full panel reports are presented in the Commission's Report at pages 73-369. The underlying detailed research reports were published in about nine volumes of Commission "Technical Reports". The Commission as a whole made factual findings based upon its research and the panel reports. These findings appear at pages 7-44 of the Commission's Report. These findings formed the basis for the Commission's recommendations, at pages 47-69 of the Commission's Report.

The Commission used several different research methods to obtain relevant information. Existing studies, literature, court decisions and statutory provisions were read and analyzed. Experts in various fields were interviewed or asked to submit papers to the Commission based upon existing knowledge. Approximately 100 national organizations were invited to express their views through written statements and views were selected from law enforcement officers, lawyers generally, and hundreds of Constitutional Law experts. Original research to discover information not previously available was conducted through surveys, controlled experiments and "quasi" experimental methods which could not include a scientifically selected "con-

trol" group. Detailed descriptions of these various original research methods are contained at pages 150-154 of the Commission's Report.

A major research effort of the Commission was a national survey of Americans which involved lengthy face-to-face interviews with a random probability sample of more than 3,000 persons in the continental United States. Such a survey employing scientifically selected probability samples may be generalized to the population of the United States as a whole within known limits of error.

In the area of law enforcement, the Commission also utilized a detailed written survey of state and municipal prosecutors in the United States. This survey was addressed to all prosecutors in large counties and cities, and to a declining percentage of prosecutors in smaller jurisdictions. A large rate of response to this survey was obtained, indicating a high degree of accuracy.

The Commission also obtained information and views through public hearings held in Washington, D.C., and Los Angeles, California, in May 1970. Fifty-five persons representing law enforcement agencies, courts, government at many levels, civic organizations, writers, publishers, distributors, film producers, exhibitors, actors, librarians, teachers, youth organizations, parents and other interested groups were invited to appear, and 31 persons accepted these invitations. Their names and affiliations are set forth at pp. 642-646 of the Commission's Report. At these hearings—and in correspondence directed to the Commission—the Commission also was given the views of numerous private citizens.

A careful study of the Commission Report demonstrates, it is respectfully submitted, that the sale of a

book to a consenting adult in a book store, which fairly notifies the public that it contains sexually explicit material, is not now obscene, no matter how explicit or tasteless the book may be thought to be. Such a sale to a consenting adult is not patently offensive to contemporary standards, does not appeal to prurient interest, and has some social value.

When the definition of "obscenity" was first adopted by the Court in *Roth*, sexual materials as distributed within the United States almost always fell easily into one of two categories. Some sexual materials, not of a high degree of sexual explicitness—such as semi-nude "pin-ups", nudist magazines with no sexual activity, pulp and pocketbook romances with only generally described sexual activity, and non-illustrated marriage manuals of a moderate degree of explicitness—were generally sold and distributed openly through lawful channels. Highly explicit sexual materials, on the other hand, which graphically depicted or described genital organs or sexual activity and all its variations—so called "hard core pornography"—were sold or distributed under-the-counter with a consciousness on the part of all concerned that the material was forbidden because "obscene". In such a situation, it might be said that hard core pornography sold under-the-counter, with a consciousness on the part of all concerned that the material was forbidden, met the test of obscenity enunciated in *Roth*. Thus, Mr. Justice Stewart could say even as late as 1964, that while accurate verbal definition of the illegally obscene was impossible, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197. Justice Stewart and others could easily recognize "obscene" material and distinguish it from the non-obscene, both because the market place treated the two

kinds of material as being of a different nature, and because the material itself was of a dramatically different sexual content.

In the last five to seven years, however, contemporaneously with dramatic changes in American sexual practices and attitudes (brought on, in some substantial degree, by scientific advances in contraception, as well as by changing moral standards in many areas), there has been an enormous change in the pattern of distribution of explicit sexual materials. This development is described in some detail in the Traffic Panel Report of the Obscenity Commission, at pp. 113-117 of the Commission's Report. Today, material with a degree of sexual explicitness formerly found only in under-the-counter books and films, is present (often in dominant part) in best-selling novels from major publishers, in best-selling non-fiction works of the marriage manual type, in first-run motion picture films from major studios, and in mass circulation magazines which are among the most important vehicles for product advertising by American businesses. This trend toward greater explicitness in openly sold mass-market over-the-counter materials has continued in the year since the Commission's Report, so that today there is virtually no sexual content, formerly found in under-the-counter materials, which is not present in books, magazines, and films which are freely available in theatres and retail outlets in all parts of the country.

The courts have recognized that material that in former days would have been thought to be "hard core" pornography is in fact protected by the First Amendment. *United States v. Stewart,* 336 F. Supp. 299 (D.C. Pa. 1971); *United States v. Motion Picture Entitled "Language of Love"*, 432 F. 2d 705 (2 Cir. 1970).

The Commission's research and surveys reflected that explicit sexual material similar to that referred to by Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. at 499, n.3, has social value to those persons who might wish to obtain such material. After being questioned extensively about a range of verbal and graphic sexual materials, including nudity with genitals exposed, heterosexual intercourse, mouth-sex organ contract, homosexual activity, and sado-masochistic materials with whips and belts, persons were asked about the effects of such materials. Sixty-one percent of the respondents said that such materials "provide information about sex" and over half of these persons had either experienced this effect themselves or seen it in someone they knew personally; 47% of the respondents said that such materials improve sex relations of some married couples and about half of these persons had either experienced this effect themselves or seen it in someone they knew personally; and substantial numbers of respondents pointed to other socially important effects of such materials. See Commission Report at pp. 157-160, 356-357.

The Commission Report also reveals that the sale of sexually explicit material to consenting adults is not patently offensive to contemporary standards. Scientific surveys and research conducted by the Commission revealed that a majority of American adults (almost 60%) believe that adults should be allowed to read or see any explicit sexual materials they want to, including "materials often referred to as 'hard core pornography', that is, pictures mainly for the purpose of seeing sex organs, pictures of men and women having (or appearing to have) sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of

homosexual activities and sex activities including whips, belts or spankings. . . ." (Commission Report, 352). Most adults had voluntarily exposed themselves to such material without harmful effects and, for the most part, were not offended by such exposure (Commission Report, 51-56).

Finally, the Commission's surveys and research strongly indicate that a person who voluntarily purchases sexually explicit material does not have his "prurient interest" aroused, although he may have his sexual interests aroused (Commission Report, 23-27, 139-243). The principal finding of the Commission's research and surveys is that people do not agree about whether or not a given sexual stimulus is "sexually arousing," "morbid," or "pornographic" (Commission Report, 355). Another important finding of these studies was that groups with different demographic characteristics differ in their judgments of explicit sexual materials. Middle-class men differ from working-class men; males differ from females; sexually experienced differ from sexually inexperienced; persons with more feelings of guilt about sex differ from those with less guilt feelings; members of religious organizations, social service organizations, professional organizations and student groups differ from each other (Commission Report, 356). The Commission also found that sexual arousal and offensiveness are independent dimensions. A sexually explicit depiction that tends to be sexually arousing may or may not be offensive; and sexual material that tends to be offensive may or may not be sexually arousing (Commission Report, 356).

The empirical evidence, accumulated by the Commission, strongly indicates, if it does not conclusively prove, that sales of sexually explicit material, under circum-

stances such as occurred in the case at bar, are not patently offensive, do not appeal to prurient interest, are not utterly without redeeming social value, and are not obscene.

C. This Court has recognized that explicit sexual material may have significant value. In *Stanley v. Georgia,* 394 U.S. 557, Justice Marshall spoke of the emotional and intellectual needs satisfied by such material. In *United States v. Reidel,* 402 U.S. 351, Justice Harlan spoke of them as "memorabilia of a man's thoughts and dreams". These thoughts and dreams—"man's inner life, be it rich or sordid" —are entitled to be free from all governmental interference.

In *United States v. Dellapia,* 433 F. 2d 1252, 1258, 1259 (2 Cir. 1970), the Court said:

> "The most fundamental premise of our constitutional scheme may be that every adult bears the freedom to nurture or neglict his own moral and intellectual growth. In a democracy one is free to work out one's own salvation in one's own way. If there is a justification for this premise, it is the faith—or the calculation—that to relinquish freedom of self-development would be to abandon most that is valuable about living. Government censorship of an adult's private thoughts would, as *Stanley* recognized, raise havoc with the individual's personality. . . ."

In *Karalexis v. Byrne,* 306 F. Supp. 1363 (D.C. Mass. 1969), vac. on other ground, 401 U.S. 216, the Court stated that if a "rich Stanley" was entitled to satisfy his emotional and intellectual needs by viewing sexually explicit material in his home, "a poorer Stanley should

be free to visit a protected theatre or library. We see no reason for saying he must go alone" (306 F. Supp. at 1367).

In *United States v. 31 Photographs, etc.*, 156 F. Supp. 350 (D.C. N.Y. 1957), Judge Palmieri ruled that explicit sexual material, imported from abroad by the Kinsey Institute for scientific study, was not obscene. The Department of Justice did not appeal.

The United States had filed a libel under 19 U.S.C.A. §1305, seeking the forfeiture of the photographs, books, and other articles which the Kinsey Institute sought to import into the United States. It was claimed that the material was "obscene and immoral" within the meaning of the statute. The Kinsey Institute sought the release of the material, maintaining that the attempted importation of the material did not violate the federal statute, and that if the statute was interpreted so as to prohibit the importation of the libeled material, the statute violated the Constitution. The district judge did not reach the constitutional issue, holding that the statute did not permit the exclusion of the material.

In the light of the record presented to the district judge, it was undisputed that the Institute sought to import the libeled material for the sole purpose of furthering its study of human sexual behavior as manifested in varying forms of expression and activity; and that as to those who would have access to the material, there was "no reasonable probability that it will appeal to their prurient interest". 156 F. Supp. at 353.

In the light of the aforesaid undisputed record, the district judge concluded that the issue presented to him was whether, assuming the material to be imported ap-

pealed to the prurient interest of the "average person", the material could nevertheless be deemed "obscene" if to the only persons who would have access to the material there was no reasonable probability that it would appeal to their prurient interest. The court concluded that under such circumstances the material could not be deemed obscene. In the court's opinion, the material, whose use is restricted to those in whose hands it would not have a prurient appeal, could not be judged by its appeal to the populace at large. The "closely regulated" use by the Kinsey Institute removed the material, in the opinion of the court, from the ban of the statute.

> ". . . It should be obvious that obscenity must be judged by the material's appeal to somebody. For what is obscenity to one person is but a subject of scientific inquiry to another. And, of course, the substitution, required by Roth, of the 'average person' test (in cases of widespread distribution) for the test according to the effect upon one of particular susceptibility, is a matter of determining the person according to whom the appeal of the material is to be judged. Once it is admitted that the material's appeal to some person, or group of persons, must be used as the standard by which to gauge obscenity, I believe that the cases teach that, in a case such as this, the appeal to be probed is that to the people for whom, and for whom alone, the material will be available. * * *
>
> ". . . It is probably sufficient unto this case to point out that there is no dispute in this proceeding as to the fact that there is no reasonable likelihood that the material will appeal to the prurient

interest of those who will see it. But I will add that I fail to see why it should be more difficult to determine the appeal of libelled matter to a known group of persons than it is to determine its appeal to an hypothetical 'average man.' The question is not whether the materials are necessary, or merely desirable for a particular research project. The question is not whether the fruits of the research will be valuable to society. The Tariff Act of 1930 provides no warrant for either customs officials or this court to sit in review of the decisions of scholars as to the bypaths of learning upon which they shall tread. The question is solely whether, as to those persons who will see the libelled material, there is a reasonable probability that it will appeal to their prurient interest." 156 F. Supp. at 358, 359-360.

The gist of the opinion rendered in *United States v. 31 Photographs* is that books, magazines, photographs, and other media of communication, are never inherently obscene; that material may be obscene when directed to one class of persons, but not when directed to another. Under Judge Palmieri's ruling, a holding of "obscenity" would require, first, a determination of the audience to which the material is primarily directed, and then, as a standard for judging the material, a person typical of that audience. If, therefore, material is sold or distributed to a willing and consenting adult, a person who desires the material, under controlled circumstances, then as to such person there is no probability that the appeal will be to anything more than a normal and candid interest in sex. Clearly, the average normal adult, typical of the limited audience willing and desirous of reading and viewing ex-

plicit sexual material under controlled circumstances, cannot be deemed to have a "morbid" or "shameful" interest in sex. The material, as to such adult under such circumstances, is not "obscene".

The California decisions have been moving in a similar direction. In *In re Giannini*, 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968), the Supreme Court of California held that a "topless" dance performed before an audience for entertainment could not be held to violate a statute prohibiting indecent exposure and lewd or dissolute conduct, in the absence of proof that the dance was "obscene". The Court stated: "Our ruling in this case rests on the simple proposition that a dance performed before an audience for entertainment cannot be held to violate the statutory prohibitions of indecent exposure and lewd or dissolute conduct in the absence of proof that the dance, tested in the context of contemporary community standards, appealed to the prurient interest *of the audience* and affronted standards of decency generally accepted in the community." 72 Cal. Rptr. at 657. (Emphasis added).

In reaching the aforesaid conclusion, the California Supreme Court held, first, that the performance of a dance, like other forms of expression or communication, enjoys protection under the First Amendment unless shown to be "obscene". The prosecution had argued that standards required of an obscenity prosecution were inapplicable in the case because the conduct "standing alone" was clearly unlawful. The Court declined to so isolate the questioned conduct and held that to judge the dance "in an entirely different context would be to distort the nature of the case . . . Thus, acts which are unlawful in a different context, cir-

cumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene". 72 Cal. Rptr. at 661.

Having held that the dance was entitled to constitutional protection unless deemed obscene, the Court then turned its attention to the question of whether the prosecution was bound to prove that the dance exceeded customary limits of candor under the state statute, both on the issue of prurient interest and patent offensiveness. The Court answered this question in the affirmative. "We conclude that the judgment must be vacated for lack of evidence as to whether, applying contemporary community standards, petitioner Iser's dance appealed to the prurient interest *of the audience* and offended accepted standards of decency." 72 Cal. Rptr. at 665 (Emphasis added).

In answer to a contention made by the prosecution that proof of community standards should not be required in cases where material was "patently obscene", the Court, in declining to so hold, stated: "In brief, this case involves a 'topless' dance shown only to adults (cf. Ginsberg v. State of New York (1968) 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195) *who knew exactly what they were going to see.*" 72 Cal. Rptr. at 664, n.8 (Emphasis added).

In *Glancy v. County of Sacramento,* 17 Cal. App. 3d 504, 94 Cal. Rptr. 864 (1971), appeal pending in the California Supreme Court, a number of city and county ordinances which made it a misdemeanor for "topless" females and "bottomless" persons of either sex to serve food or drink to customers in certain public places, or to participate in shows there, were held

constitutionally overbroad in the absence of a requirement of obscenity of the activity.

Pointing to the ruling in *Giannini*, the appellate court held that the ordinances, as applied to topless dancing or to topless waitresses, were plainly invalid since the entertainment provided, whatever its form, was entitled to first Amendment protection unless obscene. Since the ordinances omitted any requirement of proof of obscenity, it followed that the ordinances could not be upheld under the Constitution. ". . . we cannot say that, in every public setting within the scope of the ordinance, 'topless' waitresses would be 'so patently offensive as to violate any conceivable community standard.' " 94 Cal. Rptr. at 871. The *Glancy* court emphasized that the concept of obscenity may vary, depending upon whether the visual communication is restricted "to consenting adults". The court added that entertainment cannot be held to be obscene unless, applying contemporary standards, the questioned conduct "appealed to the prurient interests *of the audience*". 94 Cal. Rptr. at 872. (Court's emphasis).

It had been argued by the municipalities that "topless" and "bottomless" entertainment might be conducted in a manner calculated to deliberately emphasize sexual provocation. The court replied that in the absence of contrary evidence, "it must be assumed that such publication will be addressed only to those who freely and voluntarily elect the so-called pleasure and will not be inposed upon those whose sense of propriety might be injured or their annoyance or disgust be aroused, *since they are equally free to avoid exposure*". 94 Cal. Rptr. at 873 (Court's emphasis).

"Finally, we emphasize that our decision is made upon the record before us. By this opinion

we do not legalize all 'topless' and 'bottomless' public conduct. Nothing said herein prevents the county and city from enacting valid ordinances which adhere to the constitutional standard (U.S. Const., Amend. I). We simply hold that—contrary to the theory of these three ordinances—'topless' and 'bottomless' entertainment (including service of food or drink), of the type which the ordinances prohibit, is not obscene in *every conceivable* public setting within their scope. It undoubtedly is in some. In so holding, we follow the teaching of the *Giannini* case, supra, 69 Cal.2d 563, 72 Cal.Rptr.655, 446 P.2d 535, that 'live' nude entertainment cannot be characterized as obscene by isolating it from the context in which (including the viewers to whom) it is presented." 94 Cal. Rptr. at 873. (Court's emphasis).

D. *United States v. Vuitch*, 402 U.S. 62, sheds light on the question at bar. In that case, the court below dismissed an indictment charging abortion on the ground that the statute was unconstitutionally vague. The court below was of the view that the statute violated the Fifth Amendment because under it, "once an abortion was proved, a physician 'is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health' ". 402 U.S. at 68-69. This Court concluded that the court below was in error in its interpretation of the abortion statute, saying:

". . . Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious

> constitutional problems under this Court's previous decisions interpreting the Fifth Amendment. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); Leary v. United States, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality." 402 U.S. at 70.

The Court construed the statute as outlawing "only those [abortions] which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health", and concluded that placing the burden of proof on a doctor "would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession." *Id.* at 70-71. Accordingly, the Court held that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health'". *Id.* at 71 (emphasis added). See *Russell v. United States*, 369 U.S. 749.

Mr. Justice White concurred, relying on *United States v. National Dairy Products Corp.*, 372 U.S. 29, In that case, the court below had dismissed a Robinson-Patman indictment on the ground that the statute was, on its face, unconstitutionally vague. This Court reversed, relying on the construction of the statute set forth in the indictment. 372 U.S. at 31. The Court concluded that the "beadsight indictment" corrected the "blunderbuss statute" by alleging that the sale "below cost" was made with "predatory intent". *Id.* at 33. *Reidel* and *37 Photographs* each dealt with the statute on its face. Here we deal with the

constitutional construction of an obscenity statute. Applying the teachings of the *Vuitch*, *Russell* and *National Dairy Products* cases, the statute herein may be applied constitutionally, only if the State alleges, in its accusatory pleading, and proves, that the sale of a challenged book patently offended contemporary standards, and appealed to prurient interest, and was utterly without redeeming social value, because the sale was not surrounded by notice to the public of the book's nature and by reasonable protection against exposure to juveniles.

It follows from all the foregoing, it is submitted, that the judgment of conviction of the petitioner herein should be reversed. In the light of the stipulated record the book cannot be deemed to be "obscene", since the sale of the book to a consenting adult under controlled circumstances is not patently offensive measured by contemporary community standards, does not reasonably appeal to the prurient interest of the consenting adult, and plainly has some value to him. The application of the state obscenity statute to the petitioner herein violates the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments.

If, therefore, the consenting adult had the right, under the principles discussed above, to purchase the book, it is submitted that the petitioner had the right, under these particular circumstances, to sell the book to this consenting adult. Such a right existed for reasons similar to the rights which this Court held properly belonged to the Executive Director and the physician in *Griswold v. Connecticut*, 381 U.S. 479, 480-482, and the lecturer in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 1034-1035.

III.

The Book "Suite 69" Is Expression Protected by the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments. California Penal Code §§311 and 311.2, as Construed and Applied to Punish the Sale of Said Book by a Retail Bookseller to an Adult Who Requested and Purchased the Book, Render the State Obscenity Statutes Unconstitutional, Arbitrarily Deprive This Petitioner of His Liberty and Property Without Due Process of Law, and Abridge the Exercise by Petitioner of Freedoms of Speech and Press, All Contrary to the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

The book "Suite 69" by I. Smithson is a paperback novel containing no illustrations. The book was sold to a grown man who requested it. The book was not pandered, and concededly was not disseminated to minors nor thrust upon the general public. The frankness and candor of the book's language is no different from that found in scores of books to which this Court has afforded constitutional protection. Under any conceivable constitutional standard for judging obscenity, the book is not obscene and is entitled to constitutional protection. See, *Redrup v. New York*, 386 U.S. 767.

The book herein plainly does not exceed contemporary community standards and the limits of tolerance which the community as a whole today gives to writing about sex and sex relations. The complete frankness with which sex and sex relations are dealt with today is evident in all media of public expression, in the kind of language used and subjects discussed in every area

of society, in theatres, films, books, advertisements, dress, and in many other ways familiar to the community. The book satisfies the normal curiosity about and interest in sex which all adults presumably have; it does not appeal to a shameful or morbid interest is sex. Moreover, the uncontroverted evidence in the record establishes that the book has social importance [A. 302-304].

In *Roth v. United States*, 354 U.S. 476, this Court emphasized that "sex and obscenity are not synonymous" (354 U.S. at 487), and the decisions of this Court since *Roth* have time and again afforded constitutional protection to novels graphically describing all forms of sexual activity. No reasoned distinction can be drawn between the book herein and other books which this Court has found protected under any constitutional standard. See, *Childs v. Oregon*, 401 U.S. 1006 ("Lesbian Roommate"); *Walker v. Ohio*, 398 U.S. 434 ("Lurid Sinner," "Sin Crop," "Sands of Shame"); *Hoyt v. Minnesota*, 399 U.S. 524 ("The Way of a Man With a Maid," "Adam and Eve," "Business as Usual," "Lady Susan's Cruel Lover," "True Love Stories of Growing Up"); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 ("Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger"); *Aday v. United States*, 388 U.S. 447 ("Sex Life of a Cop"); *Books, Inc. v. United States*, 388 U.S. 449 ("Lust Job"); *Corinth Publications, Inc.*

v. Wesberry, 388 U.S. 448 ("Sin Whisper"); *Keney v. New York*, 388 U.S. 440 ("Sin Servant," "Lust School," "Lust Web"); *Mazes v. Ohio*, 388 U.S. 453 ("Orgy Club"); *Friedman v. New York*, 388 U.S. 441 ("Bondage Boarding School," "English Spanking School," "Bound and Spanked," "Sweeter Gwen," "Traveling Saleslady Gets Spanked," "Bound to Please," "Bizarre Summer Rivalry," "Heatwave," "Escape into Bondage"); *Sheperd v. New York*, 388 U.S. 444 ("Promenade Bondage," "Spanking Nurses," "Spanking Sisters," "Bondage"); *Avansino v. New York*, 388 U.S. 446 ("Promenade Bondage, Vol. 4"); *Redup v. New York*, 386 U.S. 767 ("Lust Pool," "Shame Agent"); *Memoirs v. Massachusetts*, 383 U.S. 413 ("Fanny Hill"); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 ("Tropic of Cancer"); *Tralins v. Gerstein*, 378 U.S. 576 ("Pleasure Was My Business"). See also, *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2 Cir. 1960), affg. 175 F. Supp. 488 (D.C. N.Y. 1959) ("Lady Chatterley's Lover"); *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965); *Grant v. United States*, 380 F. 2d 748 (9 Cir. 1967); *Luros v. United States*, 389 F. 2d 200 (8 Cir. 1968) ("Lesbian Sin Song," "Two Women in Love," "Pleasure House," "Lesbian Alley," "The Three Way Apartment," "The Affairs of Gloria").

Thus, in the light of the requirements of the First and Fourteenth Amendments and the interpretive decisions of this Court with respect to books indistinguishable in content from the book here involved, it is submitted that the judgment of conviction here, imposing fine and imprisonment upon petitioner, cannot stand consistent with the guarantees of the fundamental law.

IV.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein Without Any Evidence in the Record in Support of an Essential Element of the Offense, to Wit, That the Book Was Utterly Without Redeeming Social Importance, and Where the Only Uncontroverted Evidence Offered by Petitioner Established by Expert Testimony That the Book Had Social Importance, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

The record is barren of any evidence to establish that the book herein is utterly without redeeming social importance. The only evidence in the record, uncontroverted, is that the book does have social importance [A. 302-304]. The conviction of petitioner, therefore, for a violation of the state obscenity statutes rests upon a record devoid of evidence to support petitioner's alleged guilt and constitutes, it is submitted, a plain denial of due process.

A. In any criminal prosecution, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364. Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 526. In *Memoirs v. Massachusetts*, 383 U.S. 413, this

Court emphasized the importance of the "three federal constitutional criteria" for judging the alleged obscenity of material (383 U.S. at 419). With respect to the *Roth* definition, the Court also stressed the following: "Under this definition, as elaborated in subsequent cases, three elements must coalesce: '*It must be established* that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'" (383 U.S. at 418) (Emphasis added).

It follows from the aforesaid principles that an essential element of the offense of obscenity demanded by the Constitution is evidence that the material involved is utterly without redeeming social importance. It follows also that the prosecution in all such cases is constitutionally required to plead and prove all the essential elements of the offense beyond a reasonable doubt.

B. The state obscenity statutes have been construed by the court below to shift the burden of producing evidence on the element of social value to the defendant, once the prosecution in an obscenity case produces evidence that the material appeals to prurient interest and exceeds the customary limits of candor. [See, A. 3]. Such construction renders the state statutes unconstitutional. The effect of such construction is the judicial creation of a presumption that material which appeals to prurient interest and exceeds customary limits of candor is therefore utterly without redeeming social importance. This irrational presumption cannot be squared with the decision of this Court in *Memoirs v. Massachusetts*, 383 U.S. 413. This con-

struction creates an irrational presumption between the facts proved and the fact presumed, and undermines the presumption of innocence which accompanies the accused and which extends to every element of the crime. See, *Leary v. United States*, 395 U.S. 6; *Tot v. United States*, 319 U.S. 463. Thus, for example, in *United States v. Vuitch*, 402 U.S. 62, this Court interpreted a law which prohibited abortion unless "necessary for the preservation of the mother's life or health" to require that the burden be upon the prosecution to plead and prove that abortion was not necessary for such purposes. The statute was so construed because:

> "Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment. Tot v. United States [citation omitted]; Leary v. United States [citation omitted]." (402 U.S. at 70).

Moreover, the prosecution's burden cannot be met, it is submitted, by simply placing the challenged material into evidence, leaving it to the judge or jury to determine, without further evidence, whether the material is utterly without redeeming social importance. It cannot be assumed that triers of the facts are necessarily familiar with what has literary, artistic, historical, psychological, educational, entertaining, or other social value and importance. Indeed, in the years since this Court decided *Roth v. United States*, 354 U.S. 476, the principle that emerges most clearly from the decisions of this Court is that "obscenity" is not self-evident [See cases cited in Point II, *supra*]. This Court has time and time again reversed judgments of conviction and judgments *in rem* where the triers of

fact have held that the material is nothing but "hard core pornography," "dirt for dirt's sake," "unadulterated filth" and other similarly perjorative terms. To permit convictions without evidence on each of the essential elements of the offense is simply to encourage the proliferation of mistaken fact-finding by courts and juries.

The mere reading of a book cannot, standing alone, demonstrate that it is utterly without redeeming social importance. The question is not how the challenged material strikes the average judge or juror, but whether the material "has literary or scientific or artistic value or any other form of social importance." (*Jacobellis v. Ohio*, 378 U.S. 184, 191). Whether material is "utterly" without social importance, "utterly" worthless, (*Memoirs v. Massachusetts*, 383 U.S. 413) can ony be answered by witnesses who have expertise in wide areas of the social disciplines which the average jury or judge cannot be expected to have. Of course, each individual has his own standards of taste, but if law has any meaning at all, it is that decisions shall not be made unilaterally by the subjective predilections of individuals, but by objective standards supported by evidence justifying the findings made under the guidance of such standards.

To permit triers of fact in obscenity cases to presume or infer from the mere reading of material dealings with sex that it is utterly without redeeming social importance, is to open the door wide to suppression of material which is not obscene. Such a procedure en-

courages reliance upon the arbitrary subjective reactions of the trier of fact to material which it finds distasteful, and a book which the trier of fact finds particularly distasteful to himself will inevitably lead him to presume that it is utterly worthless. Protection for non-obscene material can only be assured if the burden is placed upon the prosecution to prove by sufficent evidence that all of the essential elements of obscenity are present in any particular case.

The proposition that writings and other forms of expression may not simply be presumed to be utterly without redeeming social value in the absence of evidence is empirically supported by the Report of the Commission on Obscenity and Pornography recently submitted to the Congress of the United States (Govt. Printing Office, September, 1970). After an extensive and detailed investigation of two years, the research conducted by the Commission led to several conclusions which bear directly upon the issue of the social value of material dealing with sex. First, the Commission found that "Extensive empirical investigation, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials plays a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy, or severe emotional disturbances." [Report, p. 52]. Second, the Commission found that "On the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times,

these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." [Report, p. 53]. Thus the presumption created by the court below not only violates the constitutional principles previously discussed, but runs counter to the weight of available scientific knowledge.

C. From all of the foregoing, it is submitted that the construction of the state obscenity statutes by the court below shifting the burden of producing evidence on the element of social value to the Defendant is inconsistent with the freedoms of speech and press and with due process of law. Even aside from the constitutional infirmities of such construction, petitioner's conviction is void on the Appellate Department's own terms. Petitioner did produce evidence by way of expert testimony that the book in question possessed social importance [A. 302-304]. In a previous decision, the court below had held that where the defendant in an obscenity prosecution does go forward with evidence that the material has social value, the prosecution, having the burden of persuasion, must produce evidence to prove that the material utterly lacks the social value claimed for it. *People v. Holden*, Appellate Department of the Superior Court for the County of Los Angeles, State of California, No. CR A 10754, unreported (1972). The court below reiterated this construction of the statutes in its opinion in the present case [App. Pet. A. 3-4]. As the court below has construed the state statutes, once the defendant has produced

evidence of social value, the prosecution may not rest upon the mere introduction into evidence of the challenged material itself. Thus, the court below was required to reverse petitioner's conviction under its own prior construction of the state obscenity statutes since the prosecution produced no evidence other than the material itself to prove its asserted lack of social value while petitioner did adduce testimony to prove that the book possessed social importance. Notwithstanding the total failure of proof by the prosecution on the element of social value, the court below affirmed petitioner's conviction by holding that alleged evidence of "pandering" supplied the otherwise absent element of the prosecution's case [App. Pet. A. 4-8]. As will be discussed in detail in the next portion of this Brief, the concept of "pandering" has no basis in fact or in law in the case herein, and cannot in any event be constitutionally applied to petitioner.

The effect of the ruling of the Appellate Department is to permit a judgment of conviction in an obscenity prosecution without the slightest proof, directly or indirectly, to establish an essential element of the offense, to wit, the utter lack of social value of the material. Conviction of a crime without any evidence in the record to support the accused's guilt not only constitutes a denial of due process, but an abridgement of the exercise of freedoms of speech and press protected by the First and Fourteenth Amendments. *Garner v. Louisiana*, 368 U.S. 157, 173-174; *Thompson v. City of Louisville*, 362 U.S. 199, 204-206.

V.

California Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction of Petitioner Herein Upon the Theory That Proof of "Pandering" May Serve as a Substitute for Proof by the Prosecution That the Book Is Utterly Without Redeeming Social Importance, Where No Charge of "Pandering" Was Ever Made in the Complaint nor Ever Proved, Where the Case Was Never Tried Upon Such a Theory and the Jury Was Never Instructed Upon Such an Issue, Where the Prosecution Itself Conceded That the Doctrine of "Pandering" Could Not Be Invoked to Affirm the Conviction, and Where State Statutes Which Became Effective Long After the Commission of the Alleged Offense Were Retroactively Applied to Punish the Alleged Conduct of Pandering," When Such Conduct Was Not Punishable Under the Laws of the State at the Time of the Commission of the Alleged Offense, and the Highest Court of the State Had Ruled That Evidence of Such Conduct Could Not Be Used to Support a Conviction Under the General Obscenity Statute, Arbitrarily and Capriciously Deprive Petitioner of His Liberty and Property Without Due Process of Law, Deny Petitioner the Equal Protection of the Laws, and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press, Due Process, and Equal Protection Provisions of the First and Fourteenth Amendments.

As developed in the previous portion of this Brief, the Appellate Department had construed the state obscenity statutes to require the prosecution to produce evidence that challenged material is utterly without

social value, aside from the material itself, once the defendant has produced some evidence that the material possesses social importance. See, *People v. Newton*, 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343; *People v. Holden*, Appellate Department of the Superior Court for the County of Los Angeles, State of California, No. CR A 10754, unreported (1972); App. Pet. A, pp. 3-4. Since petitioner did adduce such evidence of the book's social value, and the prosecution presented no evidence of the book's social value, and the prosecution presented no evidence on this issue, the court below was required to reverse petitioner's conviction on the basis of its own construction of the statutes. Instead, the Appellate Department upheld petitioner's conviction by devising a concept of "pandering" to serve as a substitute for proof by the prosecution that the book is utterly without redeeming social importance; such concept of "pandering" has no basis in fact or in law in the present case and results in the deprivation of petitioner's constitutional rights.

A. We deal here with the state's general obscenity statute which, at the time of the commission of the alleged offense herein, prohibited the knowing sale of "any obscene matter" (California Penal Code §311.2). The statute defined "obscene" using the tripartite definition of *Memoirs v. Massachusetts*, 383 U.S. 413 (California Penal Code §311(a)). The statute under which petitioner was prosecuted made no mention that the "context" of the sale or the "conduct" of the accused "was an element of the offense somehow modifying the word 'obscene.' " (*Rabe v. Washington*, 405 U.S. 13, 92 S. Ct. 993, 994). Nor was any charge of "pandering" ever made in the Complaint herein. In the first instance,

therefore, petitioner's conviction was affirmed on the basis of a charge never made. This Court has emphasized again and again that "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362. See, *Garner v. Louisiana*, 368 U.S. 157, 164.

Secondly, the present case was never tried upon any theory of "pandering," the jury was never instructed upon such an issue, and the prosecution itself conceded before the Appellate Department that the doctrine of pandering could not constitutionally be invoked to affirm petitioner's conviction. In the prosecution's Brief on rehearing before the Appellate Department, it was admitted that the prosecution "did not argue this concept at trial and/or on appeal" [A. 481]. The prosecution further conceded that "The case herein will have to be decided on the book per se, plus the evidence pertaining to scienter" [A. 482], and "Respondent believes the Court would be bound by People v. Rosakos (1968), 263 C.A.2d 497, 500, where that Court said that 'The seller's statement certainly cannot make that which is not obscene, obscene.'" [A. 482]. Plainly, this is not a case in which "the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." (*Ginzburg v. United States*, 383 U.S. 463, 465). This Court has frequently held that conviction of a charge on which an accused was never tried is as much as a violation of due process as it is to convict him upon a charge that was never made. *Cole v. Arkansas*, 333 U.S. 196, 201. Thus, in *Rabe v. Washington*, 405 U.S. 13, the Court reversed a judgment of conviction based upon the state's general obscenity stat-

ute, where the state court construed its statute to punish the defendant for exhibiting a film in a drive-in theatre where passersby might be offended, but conceded that defendant might exhibit the film to adults in an indoor theatre with impunity. The Court held that "The statute, so construed, is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown." (92 S. Ct. at 994).

The affirmance of petitioner's conviction on the basis of alleged "pandering" thus cannot be sustained "consistent with the fundamental notice requirements of the Due Process Clause." (*Rabe v. Washington*, Burger, C. J. concurring, 92 S. Ct. at 995).

B. In its initial decision affirming petitioner's conviction on the basis of alleged "pandering," the Appellate Department relied upon an amendment to the state obscenity statutes, California Penal Code §311(a)(2), which became effective November 10, 1969, some six months after the commission of the alleged offense herein, which provides that in obscenity prosecutions, where the circumstances of production, purchase, sale, dissemination, distribution or publicity indicated that matter is "being commercially exploited by the defendant for the sake of its prurient appeal," such evidence is probative with respect to the nature of the matter and can "justify the conclusion that the matter is utterly without redeeming social importance" (App. Pet. B, pp. 12-14). The Appellate Department granted rehearing to determine whether the amendment could be constitutionally applied in a case where the alleged offense occurred before the effective date of the legislation (App. Pet. D). Following rehearing, and notwithstanding the prosecution's concession, the Appellate Department

ruled that the concept of pandering enunciated by this Court in *Ginzburg v. United States*, 383 U.S. 463, and reiterated in *Memoirs v. Massachusetts*, 383 U.S. 413 —the concept subsequently embodied in California Penal Code §311(a)(2)—must always have been deemed to be the law in California; that the statute enacted after the commission of the alleged offense herein merley codified such pre-existing law; and that therefore the retroactive application of the statutes did not deprive Petitioner of his liberty without due process of law nor his right to a jury trial, did not subject him to any *ex post facto* application of the laws nor subject petitioner to the deprivation of his liberty on a charge never made and a theory never tried (App. Pet. A 4-8).

Without conceding the validty of the state "pandering" statute which became effective long after the commission of the alleged offense by petitioner, it is plain that the attempt to apply such statute to petitioner in order to support the conviction here runs counter to fundamental principles embodied in the Constitution. Some two years before the enactment of the "pandering" statute, the highest state court had held that the doctrine of pandering could not be invoked where no such charge was contained in the accusation and where the state legislature had created no such crime. *People v. Noroff*, 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575. In that case, the California Supreme Court made it crystal clear that the concept of pandering as enunciated in *Ginzburg v. United States*, 383 U.S. 463, and *Memoirs v. Massachusetts*, 383 U.S. 413, was not encompassed by the state obscenity statutes in force at that time—the same statutes in force at the time of the commission of the alleged offense by petitioner.

The Appellate Department sought to distinguish *Noroff* on the ground that *Noroff* merely held that where appeal to prurient interest was lacking, pandering could not supply the deficiency, but that evidence of pandering could justify the conclusion that material is utterly without redeeming social importance [App. Pet. A. 5-7]. Such attempt to distinguish the authoritative ruling in *Noroff* is wholly without merit. Here, as in *Noroff*, "The People initially charged that [the book] was obscene on its face" (63 Cal. Rptr. at 576). Here, as in *Noroff*, "unlike Ginzburg . . ., this is *not* a case in which 'the prosecution charged the offense in the context of the circumstances of production, sale and publicity and assumed that, standing alone, the publications themselves might be obscene.'" (63 Cal. Rptr. at 576). Here, as in *Noroff*, "the prosecution expressly recognized that the only issue relevant to its charge was the obscenity of the [book] per se." (63 Cal. Rptr. at 576).

The California Supreme Court held in *Noroff* that:

> "We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury bearing upon the defendants' 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime. Insofar as dictum in Landau v. Fording (1966) 245 C.A. 2d 820, 824, 830, 54 Cal. Rptr. 177 . . . suggests a contrary reading of the statutes, it is hereby disapproved." (63 Cal. Rptr. at 576).

Thus the California Supreme Court disapproved, as an impermissible construction of the state obscenity statutes then in force, the statement in *Landau v. Ford-*

ing, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), that "evidence that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance." (54 Cal. Rptr. at 179). It follows that the Appellate Department's attempt to distinguish *Noroff* is completely inconsistent with what the California Supreme Court actually held in that case, as the prosecution indeed conceded [A. 481-483].

It has long been held that a statute, on its face and as construed and applied, comes within the constitutional prohibition of *ex post facto* laws when, by its necessary operation and "in its relation to the offense, or its consequences, alters the situation of the accused, to his disadvantage." *Thompson v. Utah*, 170 U.S. 343. Indeed, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Article I, §10, of the Constitution forbids." *Bouie v. City of Columbia*, 378 U.S. 347, 353. What the court below has held is that petitioner could be convicted on the basis of alleged conduct which concededly was not proscribed at the time of the commission of the alleged offense, and which the highest court of the State had held could not be used to support a conviction under the general obscenity statute. At the time of the commission of the alleged offense, the petitioner here had "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Bouie v. City of Columbia*, 378 U.S. at 352.

C. Finally, wholly apart from the fact that no charge of "pandering" was ever made or tried before

the jury, and aside from the retrospective action of the court below which violates fundamental principles of due process and guarantees against *ex post facto* laws, there was no proof of "pandering" in the case herein. Petitioner's statement to the police officer at the time of purchase, that he had "sexy" books, and the advertisements in the back of the book, taken separately or together, could hardly be deemed sufficient to support a finding of "pandering" as this Court has interpreted the concept. See, *Redrup v. New York*, 386 U.S. 767; *Aday v. United States*, 388 U.S. 447, reversing *sub nom. United States v. West Coast News Co.*, 357 F. 2d 855 (6 Cir. 1966); *Books, Inc. v. United States*, 388 U.S. 449, reversing 358 F. 2d 935 (1 Cir. 1966); *Childs v. Oregon*, 401 U.S. 1006; *Bloss v. Dykema*, 398 U.S. 278; *Walker v. Ohio*, 398 U.S. 524; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47. See also, *United States v. Baranov*, 418 F. 2d 1051, 1053-1054 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F. 2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F. 2d 200 (8 Cir. 1968).

Petitioner in the present case no more "pandered" the book in question than did the petitioner in *Childs v. Oregon*, 401 U.S. 1006, in which this Court reversed a state obscenity conviction based upon sale of the book "Lesbian Roommate," in a *per curiam* opinion citing *Redrup v. New York*, 386 U.S. 767. In *Childs*, the Court of Appeals for the Ninth Circuit (431 F. 2d 272) was of the opinion that the conviction was supported by substantial evidence of pandering. The Court of Appeals pointed to sensational drawings and quotations appearing on the front and back covers of the book in question and, as in the present case, to

advertising in the back of the book, and, again as in this case, to a conversation had between the defendant and the police officer who purchased the book.[5] Notwithstanding such claimed evidence of pandering, this Court reversed the conviction, as aforesaid.

The alleged evidence of pandering in the present case is virtually identical to that in *Childs v. Oregon*, 401 U.S. 1006, which this Court deemed insufficient to support a conviction for sale of a novel like that in the present case to a police officer. Here, as in *Childs*, it was the police officer who initiated the discussion by specifically requesting "good sexy books" and "real good ones" [A. 54]. Here, as in *Childs*, the court below thought that advertising at the end of the book itself constituted pandering. It is plain that none of this evidence constitutes the sort of pandering identified by this Court in *Ginzburg v. United States*, 383 U.S. 463. Application of the doctrine of pandering to the facts of the present case would afford to that doctrine a broad reach never intended by this Court, and surely subversive of freedoms of speech and press and due process of law.

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[5]This conversation was described by the Court of Appeals in *Childs* as follows:

> "When Officer Prunk went to the defendant's store to investigate he asked the defendant where the defendant kept the 'dirtier books' (R.T. 243). The defendant identified a particular rack where they were kept and volunteered that the 'worst ones' were obtained from out-of-town and kept in this group. (R.T. 244). There is also evidence of pandering by the 'originator' (See, Ginzburg, 383 U.S. at 467, 86 S.Ct. 942). The advertising material inside the back cover leaves no doubt as to the market to which the book is directed." (431 F. 2d at 277, n. 7).

VI.

Californin Penal Code §§311 and 311.2, as Construed and Applied to Authorize the Judgment of Conviction Herein, Where the Standard for Judging the Alleged Obscenity of the Book Was Based Upon the Community Standards of the State, and Not Upon the Standards of the Nation as a Whole, Deprive Petitioner of His Liberty and Property Without Due Process of Law and Abridge Petitioner's Exercise of Freedoms of Speech and Press, Contrary to the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

The trial court instructed the jury to judge the alleged obscenity of the book herein solely on the basis of the contemporary community standards of the State of California [A. 445]. The Appellate Department approved the trial court's use of state standards, declining to follow the ruling of the Court in *Jacobellis v. Ohio*, 378 U.S. 184. The court below held, in effect, that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment. The adoption of the community standards of a state, as opposed to the standards of the Nation as a whole, can only result in deterring expression and undermining the guarantees contained in the First Amendment, subsumed into the Due Process Clause of the Fourteenth Amendment as a limitation upon state action.

All obscenity cases implicate First Amendment questions. The suppression of any particular expression "raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within consti-

tutional standards." (Justice Harlan in *Roth v. United States*, 354 U.S. 478, 497). Since the fundamental freedoms of speech and press are indispensable to the continuing growth of a free society, "ceaseless vigilence is the watchword to prevent their erosion by Congress or by the states. . . ." (Justice Brennan in *Roth v. United States*, 354 U.S. at 488).

The classification of obscenity as "non-speech" and therefore subject to state regulation, does not support the position of the court below. "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." *Smith v. California*, 361 U.S. 147, 155. The power to suppress obscenity is limited by the constitutional protection for free expression. See, *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Freedman v. Maryland*, 380 U.S. 51. "Since it is only 'obscenity' that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates an issue of constitutional law . . . such an issue, we think, must ultimately be decided by this Court." *Jacobellis v. Ohio*, 378 U.S. at 187-188.

First Amendment scrutiny is involved in every obscenity case because each decision in an obscenity proceeding means either that the particular communication will enter into the "thinking process of the community," or it will be suppressed. The decisions of this Court leave no doubt that the values to the individual and to society of freedom of expression are of singular importance to a free society. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. at 484.

Unless the tightest reins are placed upon the power of the states to regulate obscenity, the "marketplace of ideas" will be gravely threatened. The notion that such State is free to define "obscenity" as it desires has been rejected. In *Roth*, Justice Brennan writing for the majority of the Court, stated:

> "[W]e rejected, in this case, the argument that there is greater latitude for state action under the word 'liberty' under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment." 354 U.S. at 492, n. 31.

In *Jacobellis v. Ohio*, 378 U.S. 184, in holding that the motion picture film there involved was not obscene and entitled to constitutional protection, Justice Brennan referred again to the requirement of ascertaining the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. It was stated: "It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the states as they do to the federal government was rejected in *Roth-Alberts, supra*, where the Court's single opinion applied the same standards to both a state and a federal conviction." 378 U.S. at 187, n. 2. Hence, the principle was reaffirmed that in "obscenity" cases, as in all others involving rights derived from the First Amendment guarantees of free expression, the Court "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." 378 U.S. at 190.

A rule which permits the states to "experiment" on the basis of their own "community standards" would

eliminate independent judicial review based on federal constitutional standards. Such a "watered down version of constitutional rights" (*Garrity v. New Jersey*, 385 U.S. 493, 500) would reverse the process of absorbtion of the specific freedoms of the first ten amendments into the "liberty" guaranteed against state infringement by the Fourteenth Amendment. See, for example, *Gitlow v. New York*, 268 U.S. 652, 666; *Pennekamp v. Florida*, 328 U.S. 331, 335; *Gideon v. Wainwright*, 372 U.S. 335, 340-342; *Benton v. Maryland*, 395 U.S. 784, 793-796; *Malloy v. Hogan*, 378 U.S. 1, 4-11.

The dangers of permitting each State to set its own standards of acceptability of expression are manifest. The unevenness of censorship permitted by a multiplicity of state standards would inevitably chill the dissemination of protected expression. Publishers and producers of books, magazines, films and other media of communication cannot be expected to print or create separate editions of books or prints of film to satisfy police officers, prosecuting officials, censorship boards and private censorial groups in each of the 50 states. Ultimately, each separate "community" would censor expression for the entire country. Thus, the statement in *Jacobellis v. Ohio*, 378 U.S. 184, with respect to the requirement of a national standard, reaffirms a principle essential to the maintenance and operation of our constitutional system.

> ". . . Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due

Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' Pennekamp v. Florida, supra, 328 U.S., at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an alleged obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding." 378 U.S. at 194-195.

In addition to the aforesaid, Petitioner here adopts the argument made by the American Civil Liberties Union of Southern California and the American Civil Liberties Union, *amici curiae*, in *Miller v. California*, No. 70-73.

Conclusion.

For the foregoing reasons, the judgment herein should be reversed.

Respectfully submitted,

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